[114] [114] In my opinion the learned Magistrate was wrong in holding that only an "Analyst" as defined in section 54 could give evidence as to the nature of the liquid before the Court. Section 54 of the Excise Enactment does not shut out such other evidence. It is not a case of *expressio unius est exclusio alterius.* All that the section says is that if an "Analyst" does give evidence he may do so by means of a certificate unless either party requires him to be called to give oral evidence. If other evidence is called it must, of course, be oral.

This brings us to the question of what other evidence, if any, may be called and the answer is to be found in section 45 of the Evidence Enactment (Cap. 10). The nature of the liquid is a question of science and evidence on the point may, therefore, be given by a person specially skilled in such science. Was Mr. Lewis a person so skilled? He states in evidence, "I tested the samsu and found it to be one pint of samsu containing 13 per centum of alcohol by weight, value and duty amounted 54 cents. I tested the liquor in the course of my duty for the last seven years." In my opinion seven years' experience of this work is more than sufficient to constitute him an expert within the meaning of the section. The testing of a liquid for its alcoholic content either by the cold test or by distillation is not a matter of any great difficulty provided one has the necessary apparatus, and, even if it were, seven years' experience of the work should make a normal person expert at it. I would suggest that training and practical experience over a very much shorter period would normally be quite sufficient. The matter is clearly put on page 446 of the 9th edition of the Law of Evidence by *Woodroffe & Ameer Ali* where it is stated:—

> "Of course no exact test can be laid down by which one can determine with mathematical precision how much skill or experience a witness must possess to qualify him to testify as an expert. That question rests within the fair discretion of the Court, whose duty it is to decide whether the experience or study of the witness has been such as to make his opinions of any value."

It may be remarked in passing for the guidance of Magistrates that the competency of the expert should be shown before his evidence is properly admissible.

It was argued for the respondents that an unreported judgment of Terrell Ag. C.J. in Selangor Magistrate's Criminal Appeal No. 33 of 1933 was against the above view. I have got before me a copy of that judgment and the relevant passage is:—

> "There was also the objection that there is no evidence that Mr. Harward the Assistant Superintendent of Customs had any qualifications as an analyst. I think this objection is also fatal to the first and third charges."

I take this to mean merely that the defect lay in there having been no evidence recorded as to Mr. Harward's qualifications. In the present case Mr. Lewis's experience was set out.

On the above view of section 54 of the Excise Enactment (Cap. 133) I allow the appeal of the Public Prosecutor so far as Ang Pooi is concerned and direct that the Magistrate reopen the case and call on her for her defence.

In the case of the second respondent, Lim Keh, I dismiss the appeals against his acquittal on both charges though not for the same reasons exactly as influenced the learned Magistrate. I do not think that the prosecution has proved sufficiently possession by him of the liquid which the woman was found pouring out. No evidence was led that she was his wife and the kitchen was apparently also used by other persons living upstairs.

As to the obstruction charge the outdoor officers entered the house disguised in shorts and shirts as Chinese and Tamil civilians and when questioned refused to state who they were contrary to the provisions of section 8(ii) of the Excise Enactment (Cap. 133). Under the circumstances I do not think that a charge under section 63(a) can succeed.

Appeal partly allowed.

JAGAR SINGH v. PUBLIC PROSECUTOR

[A. Cr. J. (Howes J.) March 20, 1936]

[Perak Magistrate's Criminal Appeal No. 92 of 1935]

The Motor Vehicles Enactment (Cap. 168), s.46(i) — Driving "carelessly or without reasonable regard to the safety or convenience of other persons using the road" — Two separate offences — The Criminal Procedure Code (Cap. 6), ss.163, 166 and 422 — Duplicity of charges — Illegality.

The appellant was convicted on a charge setting forth that he drove his car carelessly without reasonable regard to the safety comfort or convenience of other persons using the road contrary to section 46(i) of the Motor Vehicles Enactment (Cap. 168).

Held: that the section created two separate offences and that the conviction was bad for duplicity. The appellant, by virtue of the provisions of section 166 of the Criminal Procedure Code (Cap. 6) could have been charged in the alternative.

Lee Chin Kee v. *Public Prosecutor,* [1935] F.M.S.L.R. 33; [1935] M.L.J. 157, considered.

B. K. Das for the appellant.

I. W. Blelloch (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

[115] **Howes J.:** This is an appeal from a conviction under section 46(i) of the Motor Vehicles Enactment, (Cap. 168) which reads:— [115]

> "46 (i) A person who drives a motor vehicle on any road carelessly or without reasonable regard to the safety comfort or convenience of other persons using the road shall be punished with a fine which may extend to one hundred dollars."

The charge framed was as follows:—

> "That you at 6.45 p.m. on 5-11-35 at Tanjong Malim did drive your car carelessly without reasonable regard to the safety comfort or convenience of other persons using the road thereby resulting in a collision of your car to wit with the Police loadometer an offence under section 46(i), Motor Vehicles Enactment (Cap. 168)."

The first ground of appeal is that the charge is bad in law for duplicity. This was a summary trial, and it is necessary to refer to section 173 of the Criminal Procedure Code (Cap. 6) which governs such trials. It reads thus:—

"(a) When the accused appears or is brought before the Court a charge containing the particulars of the offence of which he is accused shall be framed and read and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried."

Section 163 of the Criminal Procedure Code (Cap. 6) provides:—

"For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 164, 165, 166 and 170."

Section 166 provides that where it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged in the alternative with having committed some one of the said offences. This section could have ben utilised in the present case, but it was not.

Upon reading section 46(i) of the Motor Vehicles Enactment, I am satisfied that it contemplates two distinct offences: (1) driving carelessly; (2) driving without reasonable consideration. To quote the judgment of Avory J. in *Rex* v. *Surrey Justices; Ex parte Witherwick,* [1932] 1 K.B. 450, 452:—

"It is not necessary to give illustrations of how a man may be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons, but if a person may do one without the other, it follows as a matter of law that an information which charges him in the alternative is bad. It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois convict.*" .....

This dictum was approved by the Court of Criminal Appeal in *Charles Wilmot* v. *Rex,* (1933) 24 Cr. App. R. 63.

In these States the law is different; there being the provision above referred to, for the charge being made in the alternative, but the alternative charge must be set out separately, and the Court must either acquit or convict the accused of it.

In the present case, the Magistrate combined the two offences in the one charge, namely, "did drive your car carelessly without reasonable regard to the safety, etc.,' and added the words "thereby resulting (*sic*) a collision to wit the Police loadometer" which form no part of the statutory offence with which the accused was charged. The addition of these words might lead an ignorant person to assume that it was a criminal offence, accidentally to collide with a police loadometer and further embarrass him. This point, however, was not taken, and, if it had been, I should be disposed to hold that this was only an irregularity and not an illegality.

After reserving judgment, on a subsequent day the Magistrate recorded:—"Defendant convicted. Fined $25.25 and costs or fortnight R.I.".

The result is that it is impossible to say of which offence the defendant has been convicted.

For the respondent, the Deputy Public Prosecutor relies on the decision of Thomas C.J. in *Lee Chin Kee* v. *Public Prosecutor,* [1935] F.M.S.L.R. 33; [1935] M.L.J. 157 in which the learned Chief Justice held that duplicity of charges is an irregularity and not an illegality. Consequently, as no faillure of justice had been occasioned, section 419 of the Criminal Procedure Code (now section 422) applied, and for this reason that appeal was rejected.

Section 422 provides that "Subject to the provisions contained in this Chapter (of the Code) no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account—

"of any error, omission or irregularity in the....., charge.....unless such error, omission,.....irregularity.....has occasioned a failure of justice."

The learned Chief Justice quoted a note (No. 42) in *Sohoni's* "Code of Criminal Procedure", 12th ed., p. 1145 "where the defect is one of duplicity and not misjoinder this section may be [116] applied," i.e. section 537 of the Indian Code of Criminal Procedure which corresponds to the present section 422 of our Criminal Procedure Code. [116]

This note (also No. 42 on p. 1160 in the 13th ed. of *Sohoni*) refers the reader to note 7 at p. 564, the sub-heading of which note is "Separate offences ought not to be lumped together in a single charge" under the major heading "Separate charges for each distinct offence."

This, I assume, is the note to which the learned Chief Justice referred in his judgment as being on page 565 of the 12th edition, although note 7 begins on page 564 thereof.

I have studied note 7, and the cases quoted therein appear to me to be clearly distinguishable from the present, and from that which was heard by the learned Chief Justice. Some of them refer to such casse as a charge framed in respect of hurt caused to two different persons; three complaints of cheating different persons of different sums combined in a single charge, as in *Musai Singh* v. *Emperor,* I.L.R. 41 Cal. 66 and so on. In that case, it was stated, "If the Magistrate had treated the three complaints as complaints of distinct offences and had drawn up three separate charges, the procedure would have been without defect." As it was, the defect was treated as an irregularity, and consequently curable under section 537 of the Indian Code, the Court being of opinion that "the petitioner clearly understood what he was being tried for, and was not in any way prejudiced," and for this reason the appeal was dismissed.

Most of the cases quoted support the sub-heading to note 7, and this is summed up by the statement on page 565, "There is no doubt that according to the general principle, a duplicity of the charge is not allowed." Moreover, in none of them was there any ambiguity as to the nature of the charge, which might have embarrassed the accused.

The object of section 233 of the Indian Code was fully explained by Jackson J. in *Mahomed Humayoon Shah* v. *Regina,* 21 W.R. Cr. 72, 82 (quoted in *Sohoni,* 13th ed., p. 563), "The charge I take to be first, a notice to the prisoner of the matter whereof he is

accused, and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself; second, it is an information to the Court which is to try the accused, of the matters to which evidence is to be directed."

Bot these essentials were absent in the present case.

With the greatest respect to the learned Chief Justice, I am unable to apply his decision on this point in the case of *Lee Chin Kee* v. *Public Prosecutor, supra,* to the present case.

It seems to me an elementary principle of criminal law that an accused person must know exactly what is the charge which he is called upon to answer; and still more so, that he should know of what offence he has been convicted. This is the English law, and I can find nothing in the Criminal Procedure Code to justify my finding that the same principles do not apply in the Federated Malay States. The only difference is that here the Public Prosecutor has the advantage of being able to frame an alternative, but separate, charge.

In view of the express provisions of the Criminal Procedure Code, section 163, that for every distinct offence there shall be a separate charge, I hold that the trial of the accused for the two distinct offences contemplated in section 46(i) of the Motor Vehicles Enactment (Cap. 168) in one charge was not a mere irregularity, but was an illegality, and for this reason the conviction must be quashed, and the fine repaid to the defendant.

Appeal allowed.

---

[117] **PRIVY COUNCIL REPORTS**

ANDRE PAUL TERENCE AMBARD v. ATTORNEY-GENERAL OF TRINIDAD AND TOBAGO

[P.C. (Lords Atkin, Maugham and Sir Sidney Rowlatt) March 2, 1936]

[Privy Council Appeal No. 46 of 1935]

Contempt of Court — Administration of justice — Publication of comments — Liberty of the press.

Privy Council — Practice — Contempt of Court — Whether appeal entertained.

By an order of the Supreme Court of Trinidad and Tobago the appellant was fined for contempt of Court alleged to have been committed by the publication in a newspaper of a certain article commencing on the inequality of sentences, citing as examples two sentences at the local sessions in charges of intent to murder. The appellant expressly disclaimed any suggestion that one of the judges was habitually severe, the other habitually lenient. On appeal to the Privy Council:—

Held: that it is the ordinary right of members of the public or the press to criticise in good faith in private or public the administration of justice.

Held further, that to justify a committal for contempt of Court there must be evidence in the article itself taken as a whole, that the publisher has acted with untruth or malice, or that he imputed improper motives to those taking part in the administration of justice.

Upon a preliminary objection raised by the respondent:—

Held, that it is competent to His Majesty in Council to give leave to appeal and to entertain appeals against orders of courts of record overseas imposing penalties for contempt of court.

PRIVY COUNCIL. — Appeal by special leave from the judgment of the Supreme Court of Trinidad and Tobago (September 5, 1934) committing the appellant for contempt of court by publishing on June 29, 1934, in *The Port of Spain Gazette,* an article headed "The Human Element" and ordering him to pay a fine of £25/- or in defaut to be imprisoned for one month and to pay the costs of the proceedings as between solicitor and client.

F. P. M. Schiller, K.C and *Kenelm Preedy* for the appellant.

Edward W. Cave, K.C. and *Richard A. Willes* for the respondent.

The facts appear sufficiently in their Lordships' judgment which was delivered by —

Lord Atkin: This is an appeal by special leave from an order of the Supreme Court of Trinidad and Tobago ordering the appellant to pay a fine of £25 or in default to be imprisoned for one month for contempt of court, and further ordering him to pay the costs of the proceedings as between solicitor and client.

The first question that arises is whether as contended by the respondent the Privy Council is incompetent to entertain an appeal from an order of a court of record inflicting a penalty for contempt of court. The decisions on the point are conflicting. In *Rainy* v. *Justices of Sierra Leone* (1852), 8 Moo. P.C.C. 47; a Board consisting of Lord Cranworth, Knight Bruce L.J., Dr. Lushington and Sir Richard Ryan undoubtedly decided that no such appeal lay. Lord Cranworth, in giving the judgment of the Board, after pointing out that in this country every court of record is the sole and exclusive judge of what amounts to a contempt of court proceeded:

> "We are of opinion, that it is a court of record, and that the law must be considered the same there as in this country; and, therefore, that the orders made by the court in the exercise of its discretion, imposing these fines for contempts, are conclusive, and cannot be questioned by another court; and we do not consider that there is any remedy by petition to the Judicial Committee to review the propriety of such orders."

The argument, with respect, is not convincing, for it would seem to apply equally to all decisions in criminal cases which at that time in both this country and the colony were conclusive and could not be questioned by any court. In *McDermott* v. *Justices of British Guiana* (1868), L.R. 2 P.C. 341, leave to appeal from a committal for contempt had been given "without prejudice to the competency of Her Majesty to entertain an appeal." At the hearing the Board, consisting of Lord Chelmsford, Wood L.J., Sir James Colvile and Sir E. Vaughan Williams, treated the hearing as a motion to revoke the leave. An incidental question was whether the court that imposed the penalty was a court of record and in giving the